in the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-276

CARL HILLSTROM, HENRY KEPPEL,
RICHARD DARROW AND ROBERT SAVKO,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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DATED: August 13, 1976

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INDEX

AUTHORITIES CITED

STATUTES

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United States

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The Petitioners, CARL HILLSTROM, HENRY KEPPEL, RICHARD DARROW and ROBERT SAVKO, pray that a Writ of Certiorari, issue to review the Judgment and Opinion entered on June 9, 1976, by the United States Court of Appeals for the Fifth Circuit in a proceeding entitled: UNITED STATES OF AMERICA, Plaintiff-Appellee, VERSUS, CARL HILLSTROM, HENRY KEPPEL, LOREN STOCKTON, LEONARD STOCKTON, RICHARD DARROW and ROBERT SAVKO, Defendants-Appellants, Docket No. 75-3248.

OPINION BELOW

The Judgment and Opinion of the Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix at page 1A of the Petition of CARL HILLSTROM, HENRY KEPPEL, RICHARD DARROW and ROBERT SAVKO.

JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on June 9, 1976 and the Petition for Rehearing was denied on July 15, 1976. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

(1) Whether the Circuit Court of Appeals erred in not applying the law as enunciated by this Court in the cases of *Bowen vs. United States*, 95 S.Ct. 2569 (1975); *Brighoni-Ponce vs. United States*, 95 S.Ct. 2574 (1975); *United States vs. Ortiz*, 95 S.Ct. 2585 (1975); and *Almeida-Sanchez vs. United States*, 413 U.S. 266, 93 S.Ct. 2535 (1973), to the instant case wherein the Coast Guard, acting as agents of the United States Customs Bureau, pursuant to Title 14, United States Code, Section 89(b)(1) and (2), conducted a search of an American Flag Vessel five hundred (500) miles from United States Customs waters?

(2) Whether the Circuit Court of Appeals erred in not applying the law as set forth in Title 14, United States Code, Section 89(b)(1) and (2) and Title 19, United States Code, Section 1581(a) to the instant case wherein the

Coast Guard was ordered by the United States Customs Bureau to board an American Flag Vessel five hundred (500) miles from United States Customs waters?

STATUTORY PROVISIONS INVOLVED

Title 14, United States Code, Section 89(b), states as follows:

> "(b) The officers of the Coast Guard insofar as they are engaged pursuant to the authority contained in this section, in enforcing any laws of the United States shall:
>
> (1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular laws; and
>
> (2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

Title 19, United States Code, Section 1581(a), provides in pertinent part:

> "any customs officer may at any time go on board any vessel or vehicle in any place *in the United States* or *within the customs waters*, or as he may be authorized within a customs-enforcement area, established under Sections 1701, 1703, 1711, of this Title, or any other authorized place, without as well as within his district and examine the mani-

fest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board and to this end may hail and stop such vehicle or vessel and use all necessary force to compel compliance". (emphasis ours).

STATEMENT OF THE CASE

The Petitioners, CARL HILLSTROM, HENRY KEPPEL, RICHARD DARROW and ROBERT SAVKO, were Defendants in the trial court below, in the criminal case of United States of America vs. Carl Hillstrom, Henry Keppel, Loren Stockton, Leonard Stockton, Richard Darrow and Robert Savko, Case Number 75-263 CR NCR, filed in the United States District Court for the Southern District of Florida, the Honorable Norman C. Roettger, Jr., presiding.[1]

The Petitioners, CARL HILLSTROM, HENRY KEPPEL, RICHARD DARROW AND ROBERT SAVKO, were indicted on the charge of willfully, knowingly and unlawfully combining, conspiring, confederating, and agreeing to violate Section 952(a) of Title 21, United States Code, all in violation of Section 963, Title 21, United States Code (i.e., conspiracy to import marijuana into the United States).

After jury trial, the Petitioners were convicted of the charge previously set forth.

[1]Defendants Loren Stockton and Leonard Stockton have not joined in this Petition for Certiorari.

The charge and conviction arose out of the following scenario:

On the 29th day of March, 1975, the Petitioners were proceeding on the sailing vessel "Royono" through the Windward Passage between the islands of Haiti and Cuba. At approximately 9:00 o'clock P.M., the United States Coast Guard cutter "Cape Knox" approached the "Royono" and asked the identity of the crew. Upon ascertaining identification, the Coast Guard cutter pulled back and continued to follow from a distance.

On or about the morning of March 30, 1975, the cutter, "Cape Knox" again approached and ordered the "Royono" to heave to and prepare for boarding and ordered the crew to assemble on deck. Both United States Coast Guard crew members and *United States Customs Agent, Robert Richter* then boarded the "Royono".

The Coast Guard crew members stated they were boarding the vessel for a "routine safety inspection" and one officer proceeded to check identification of all persons aboard, as well as the vessel's documentation. Simultaneously, the other Coast Guard Officer, Harold Eads, checked the life jackets and ordered one of the Defendants to take him below deck. Below deck, the subject marijuana packages were totally covered by unused sails and thus at that point were not in plain view. Once below deck, Officer Eads unfolded the sails, pulled back the plastic and burlap and discovered the marijuana. At that time he called Customs Officer Richter downstairs who also checked the contents of the bales and told the Petitioners they were under arrest. They then changed their minds and told the Petitioners they were being detained.

Upon discovery of the marijuana the Customs Officer and Coast Guard crewmembers immediately contacted the "Cape Knox" and additional Coast Guard crewmen boarded the "Royono" along with Drug Enforcement Agent Molyneux. The vessel was searched again and the Petitioners were then advised they were under arrest and were read their rights.

When the Coast Guard crewmen and Customs Agent Richter boarded the vessel "Royono" and searched said vessel, the Petitioners were not under arrest, prior to, or at the time, during the search, nor were they advised of their constitutional rights until after the search was conducted. The Petitioners were never shown a search warrant by any of the government agents boarding their vessel at any time and, in fact, no search warrant was ever obtained.

The Petitioners did not act in any manner or engage in any conduct so as to arouse a real or apparent suspicion in the minds of the government agents which would require that the vessel be stopped and searched.

In addition to the foregoing facts presented herein with regard to the boarding, "inspection" and search of the "Royono" the Court should be apprised of other facts which were not available to counsel for the Petitioners at the time Petitioners' Motion to Suppress the Evidence was heard.

Petitioners subpoenaed Rear Admiral Austin C. Wagner, U.S.C.G. The subpoena duces tecum served on Admiral Wagner was for various documents which included

written orders, instructions, memorandum, TWX messages, and all written communications pertaining to the deployment of the United States Coast Guard vessels, Diligence and Cape Knox in or about the Windward Passage. The Government resisted the disclosure of the material. (T. 35-41).[2] The trial court reserved ruling for an in camera inspection during the first recess. After Admiral Wagner testified, the trial court ruled that certain messages and reports should be turned over to the Petitioners. Thereupon, counsel for the Government stated he would provide copies in the evening after the hearing on the Motion to Suppress. (T. 59-66).[3]

One of the messages that was turned over to the Petitioners after the hearing directly contradicted the testimony of all the Coast Guard officials, Drug Enforcement Agent Officials and Customs Officials that testified.

In a message sent on March 30, 1975 from Coast Guard District Seven (Miami) to the Commandant of the Coast Guard, Washington, D.C., it was stated that after the Cape Knox identified the name of the "Royono" on the night of March 29, 1975, the Coast Guard fed the name into the Customs computer. The Customs computer "HIT" on the vessel *name* but the description of the vessels *did not match*. Then, "Customs recommended boarding". (A. 6).

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[2]The Letter "T" refers to the transcript of the hearing held on Petitioners' Motion to Suppress the Evidence, which transcript is contained in the Record on Appeal on file in the United States Court of Appeals for the Fifth Circuit.

[3]Id.

REASONS FOR GRANTING WRIT

The Coast Guard TWX message to Washington contradicted every bit of testimony by the Coast Guard, that they boarded the "Royono" for the purpose of a "documentation and safety inspection".

Further, it is submitted that the TWX message was one of the documents that the Government sought to withhold from the Defendants. The TWX message should have been included in the "Brady Material" that the Government was required to turn over to counsel for the Defendants as well as under Rule 16 of the Federal Rules of Criminal Procedure, and the trial Court's standing discovery order entered on the 10th day of July, 1975. (R. 247).[4]

It is therefore perfectly clear that the "inspection" was nothing more than a ruse to search the "Royono" for customs violations, and clearly explains the presence of Customs Officer Richter in the first boarding party.

In recent cases, this Court has held that warrantless border type searches far removed from a United States border, requires a showing of probable cause in order to validate a warrantless search. *Bowen v. United States*, 95 S.Ct. 2569 (1975); *Brighoni-Ponce vs. United States*, 95 S.Ct. 2574 (1975); *United States v. Ortiz*, 95 S.Ct. 2585 (1975); *Almeida-Sanchez vs. United States*, 413 U.S. 266, 93 S.Ct. 2535 (1973).

[4]The Letter "R" refers to the Record on Appeal in the case at bar on file in the United States Court of Appeals for the Fifth Circuit.

It is therefor established that just because the Petitioners were five hundred (500) miles from the United States, and were situated on a sailing vessel, does not mean that they have waived their constitutional rights to be free from unreasonable searches.

As previously stated, the Coast Guard boarded the "Royono" upon direct orders from the United States Customs Bureau (A. 6). Accordingly, pursuant to Title 14, United States Code, Section 89(b) (1) and (2), when officers of the Coast Guard are engaged in enforcing any laws of the United States they are deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of that particular law; and the coast guard is subject to rules and regulations promulgated by such department or independent establishment with respect to the enforcement of said laws.

It is submitted that the Coast Guard, acting as an agent of the United States Customs Bureau, pursuant to Title 14, United States Code, Section 89(b)(1) and (2) exceeded its authority and jurisdiction in that the search was not a legitimate border search of the vessel and therefore was beyond the jurisdiction of the United States Customs Bureau.

Title 19, United States Code Section 1581(a) in pertinent part provides that:

> "Any customs officer may at any time go on board any vessel or vehicle at any place *in the United States* or *within the customs waters*, or as he may be authorized within a customs-enforce-

ment area established under Sections 1701, 1703 and 1711 of this Title, or any other authorized place, without as well as within his district and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance". (emphasis ours.)

It is Petitioners' position that this is the main issue in this case (i.e., whether the Coast Guard, acting as an agent of the United States Customs authorities, exceeded its jurisdiction by searching an American Vessel for contraband which was approximately five hundred (500) miles from any United States border and/or customs waters). It is respectfully submitted that the answer is a resounding "yes". The auhority for said answer is based upon numerous cases of this court. *Bowen v. United States*, 95 S.Ct. 2569 (1975); *Brighoni-Ponce v. United States*, 95 S.Ct. 2574 (1975); *United States v. Ortiz*, 95 S.Ct. 2585 (1975), and *Almeida-Sanchez v. United States*, 413 U.S. 266, S.Ct. 2535 (1973).

The Government contends that the Coast Guard has the authority to board a United States Flag Vessel anywhere in the world and make a documentation and safety inspection. 46 U.S.C. 89(a). The government further contends that probable cause and/or a search warrant for such "inspection" are not necessary.

However, this Court has dismissed the Government's contention that warrantless searches based on Federal Statutes are at all times valid.

> "No act of Congress can authorize a violation of the Constitution". *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct., 2535, 37 L.Ed.2d 596 (1973).
>
> See Also: *Bowen v. United States*, 95 S.Ct. 2569; *United States v. Brighoni-Ponce*, 95 S.Ct. 2574; and *United States v. Ortiz*, 95 S.Ct. (1975).

In the case of *United States v. Brighoni-Ponce*, *supra*, this court went a step further than in the *Almeida-Sanchez* case, by its holding:

> "We are unwilling to let Border Patrol dispense entirely with the requirement that officers must have reasonable suspicion to justify Border Patrol stops. In the context of Border area stops, the reasonableness requirements of the Fourth Amendment demands something more than the *broad and unlimited discretion* sought by the Government. ID. at 2580, 2581 (footnotes omitted) (emphasis ours).

It is submitted that the type of search conducted in the case at bar was a "border type" search to ferret out ships bound for the United States with contraband.

This type of conduct, whereby the Government utilizes roving checkpoints to stop vessels or moving objects five hundred (500) miles from the United States Customs

waters and inspect them at random, is precisely the type of activity condemned by this court in *Almeida-Sanchez v. United States, Bowen v. United States, Brighoni-Ponce v. United States* and *United States v. Ortiz, supra.*

Accordingly, it is submitted that the Circuit Court's ruling with regard to the Petitioners' Motion to Suppress the Evidence is in direct conflict with this Court's ruling in, *Almeida-Sanchez vs. United States, Bowen v. United States, Brighoni-Ponce vs. United States* and *United States v. Ortiz, supra* as well as Title 14, United States Code, Section 89(b)(1) and (2) and Title 19, United States Code, Section 1581(a).

Upon the foregoing, it is respectfully submitted that Certiorari should be granted the Petitioners, CARL HILLSTROM, HENRY KEPPEL, RICHARD DARROW and ROBERT SAVKO.

CONCLUSION

Based upon the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit Court of Appeals.

DATED: August 13, 1976.

RESPECTFULLY SUBMITTED

LAW OFFICES OF
RICHARD B. MARX
Suite 7A
2951 South Bayshore Drive
Miami, Florida 33133

/s/ Richard B. Marx

RICHARD B. MARX
Attorney for Petitioners

CERTIFICATE OF MAILING SERVICE

I HEREBY CERTIFY that three true and correct copies of the above and foregoing were mailed to: DONALD FERGUSON, ESQ., Assistant United States Attorney, United States Attorney's Office, 300 Ainsley Building, Miami, Florida, this 13 day of August, 1976. Office of the Solicitor General, Department of Justice, Room 5216, Washington, D.C.

/s/ Richard B. Marx

RICHARD B. MARX, ESQ.
LAW OFFICES OF
RICHARD B. MARX
Suite 7A
2951 South Bayshore Drive
Miami, Florida 33133

United States Court of Appeals,
Fifth Circuit.

No. 75-3248.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Carl HILLSTROM, Henry Keppel, Loren Stockton, Leonard Stockton, Richard Darrow and Robert Savko,
Defendants-Appellants.

June 9, 1976.

Defendants were convicted before the United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., of conspiring to violate statute which makes illegal the importation of marijuana into the United States, and they appealed. The Court of Appeals held that where Coast Guard officers, acting under statutory authority to prevent violation of United States law, conducted safety and documentation inspection abroad sailboat and in the progress thereof observed a large number of bags which contained marijuana, it could not be said that prior suspicion of the presence of drugs, or the suggestion by drug enforcement agency that inspection be made tainted the validity of the safety and documentation inspection; that Government's failure to inform defense sooner than three days before trial that Coast Guard first class gunner's mate would testify did not prejudice rights of defendants; and that reasonable minds could conclude that

evidence was inconsistent with the hypothesis of the defendants' innocence, and thus it was not error to deny defendants' motion for a judgment of acquittal.

Affirmed.

1. Searches and Seizures — 3.3(4)

In establishing the admissibility of evidence seized under the "plain view" doctrine, the law enforcement officer must be justified in making his initial intrusion in the course of which he came across incriminating evidence.

2. Criminal Law — 394.4(11)

Shipping — 9

Where Coast Guard officers, acting under statutory authority to make inquiries and seizures upon the high seas to prevent violation of United States law, conducted a safety and documentation inspection aboard sailboat and in the progress thereof observed a large number of bags which contained marijuana, it could not be said that prior suspicion of the presence of drugs, or the suggestion by drug enforcement agency that inspection be made, tainted the validity of the safety and documentation inspection, and thus denial of motion to suppress the marijuana seized was proper. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1002(a), 21 U.S.C.A. §§ 846, 952(a); 14 U.S.C.A. § 89(a).

3. Criminal Law — 629

In prosecution for conspiracy to violate statute which makes illegal the importation of marijuana into the United

States, Government's failure to inform defense sooner than three days before trial that Coast Guard first class gunner's mate would testify did not prejudice rights of defendants, and trial court acted within its discretion in admitting such witness' testimony. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1002(a), 21 U.S.C.A. §§ 846, 952(a).

4. Conspiracy — 48.1(2)

In prosecution for conspiring to violate statute which makes illegal the importation of marijuana into the United States, reasonable minds could conclude that evidence was inconsistent with the hypothesis of the defendant's innocence, and thus it was not error to deny defendants' motion for a judgment of acquittal. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1002(a), 21 U.S.C.A. §§ 846, 952(a).

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

Defendants were indicted and convicted under 21 U.S.C.A. § 846 on the charge of wilfully conspiring to violate 21 U.S.C.A. § 952(a), which makes illegal the importation of marijuana into the United States. On March 30, 1975, Coast Guard officers and a United States Customs agent arrested the defendants who were aboard the ROYONO, a 62 foot sailboat of United States ownership and

registry, which was then located in the Windward Passage between Cuba and Haiti. While on board to conduct a safety and documentation inspection, the officers observed a large number of bags which contained marijuana. Convicted by a jury, the defendants argue on appeal that the following trial court actions constitute error: (1) denial of the motion to suppress the evidence seized aboard the ROYONO; (2) allowing the testimony of Coast Guard First Class Gunner's Mate James H. Sipes; and (3) denial of defendants' motion for acquittal and for acquittal notwithstanding the verdict. We affirm.

[1, 2] In establishing the admissibility of evidence seized under the "plain view" doctrine, the law enforcement officer must be justified in making his initial intrusion, in the course of which he came across incriminating evidence. Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564, 583 (1971). Here the Coast Guard acted under its statutory authority, 14 U.S. C.A. § 89(a), to make inquiries and seizures upon the high seas to prevent violations of the laws of the United States. United States v. Odom, 526 F.2d 339 (5th Cir. 1976). In the course of its documentation inspection it became necessary for the Coast Guard to dislodge several bales of marijuana in order to ascertain the documentation number on the frame. The contraband could not be in plainer view. The ship was not licensed to carry cargo of any kind. In light of the Coast Guard's responsibility under 14 U.S.C.A. § 89(a) to prevent the violation of United States law, the defendants are entirely unwarranted in their suggestion that prior suspicion of the presence of drugs, or the suggestion by a drug enforcement agency that inspection be made, tainted the validity of the safety and documentation inspection.

[3] The Government's failure to inform the defense sooner than three days before trial that Mr. Sipes would testify did not prejudice the rights of the defendants, and the trial court acted within its discretion in admitting Mr. Sipes' testimony. See United States v. Hancock, 441 F.2d 1285 (5th Cir.), cert. denied, 404 U.S. 833 92 S.Ct. 81, 30 L.Ed.2d 63, reh, denied, 401 U.S. 987, 92 S.Ct. 444, 30 L.Ed.2d 371 (1971).

[4] Reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accuseds' innocence, United States v. Ragano, 520 F.2d 1191 (5th Cir. 1975), and therefore it was not error to deny defendants' motion for a judgment of acquittal.

AFFIRMED.

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INFO RUEDEEA/COMLANTAREA COGARD NEW YORK NY
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LAW ENFORCEMENT SITREP ONE S/V ROYONO

1. SITUATION

A. 2922000Q MAR 75 CGC DAUNTLESS SIGHTED SUBJ AT APPROX POSIT 18-51N 74-30W. COMMENCED INTERCEPT WITH ASSISTANCE OF CAPE KNOX.

B. 2923000Q CAPE KNOX CAME ALONG SIDE SUBJ AND IDENTIFIED HIM.

C. IDENTIFICATION DATA PASSED TO CUSTOMS COMPUTER.

D. CUSTOMS REPORTED COMPUTER HIT ON VSL, HOWEVER, VSL DESCRIPTION DID NOT MATCH.

E. CUSTOMS RECOMMENDED BOARDING.

F. 3000845Q MAR 75 CAPE KNOX CONDUCTED BOARDING AND DISCOVERED APPROX 4000 LB MARIJUANA.

G. POB: KEPPEL, HENRY H. SSN 160 38 9049 DOB 6/21/48
HILSTROM, CARL A. SSN 199 36 6404 DOB 2/14/49

PAGE TWO.RUCLFOA9888 UNCLAS E F T O FOUO
STOCKTON, LOJEN C. SSN 178 38 6835 DOB 6/03/50
STOCKTON, LEONARD C. SSN 178 38 6833 DOB 6/18/52
SAVKO, ROBERT C. SSN 184 38 4470 DOB [illegible]

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App. 6